

## IS HAMLET SCANDINAVIAN CRIME FICTION?\*

*MARKÉTA KLUSOŇOVÁ\*\**

### INTRODUCTION

It is becoming increasingly difficult to ignore the connection between law, art and ideology. In current legal theory, ideology has become a central issue for legal argumentation due to the close connection between ideology and narrative. The investigation of story-telling has been (implicitly) a continuing concern within the Law and Literature movement since its beginning.<sup>1</sup> Today, Law and Literature is an inherent part of legal academia<sup>2</sup> and is relevant especially for legal interpretation of argumentation.<sup>3</sup>

Central to the entire discipline of Law and Literature is the concept of narrative as the common basis of both law and art.<sup>4</sup> One of the most significant current discussions in legal theory is whether non-legal arguments may be applied in legal argumentation. This issue has been studied by many researchers using ideas of Law and Literature, Law and Humanities or Law and Economics movements (e.g. Posner, White or Weisberg). Still, any consensus on this issue has not been widely reached yet.

Over the past century, there has been a dramatic increase in influence of ideology on global discourse. Furthermore, in recent years, there has been a growing interest in the impact of ideology on everyday life. Recently

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\*\*Department of Legal Theory, Masaryk University, Brno, Czech Republic; [M.Klusonova@gmail.com](mailto:M.Klusonova@gmail.com).

Author has received her PhD degree in Theoretical Legal Sciences from Masaryk University, Brno, Czech Republic in 2016, and works as an assistant professor at the Department of Legal Theory of the same university.

She is researching the use of fiction literature as an argument in judicial decisions. She is also studying towards a bachelor's degree in theatrolgy at Masaryk University, focusing, inter alia, on law as a form of ritual theatre, the role of theatre in legal education, as well as legal aspects of street art performances.

<sup>1</sup> John H. Wigmore, 'One Hundred Legal Novels' (1942) 8 J. Marshall LQ 180.

<sup>2</sup> Jeanne Gaakeer, 'The Future of Literary-Legal Jurisprudence: Mere Theory or Just Practice?' (2011) 5 Law and Humanities 185.

<sup>3</sup> *ibid* 1.

<sup>4</sup> Robert M. Cover, 'Foreword: Nomos and narrative' (1983) 97 Harv. L. Rev 4.

researchers<sup>5</sup> have examined the effects of ideology on politics or art, but not on law. With regards to this connection, a considerable amount of literature has been published on Žižek's notion on ideology.

Surveys such as that conducted by Vighi and Feldner showed that Žižek call for a reconceptualisation of the paradigm of ideology critique.<sup>6</sup> The understanding of ideology has been changing in recent years because of the critique of the situation in which narratives dealing with ideology focus exclusively on totalitarian and post-totalitarian regimes. Such narratives, which emphasise the fight against totalitarianism have been the object of criticism in recent years.<sup>7</sup>

However, these important changes in approach to understanding the notion of ideology are also having a serious effect on the legal system and of course on legal theory. Nevertheless, previous studies on ideology have not dealt with law in the sense of legal argumentation and so far, there has been little discussion about this issue. Little is known about ideology in legal argumentation and it is not clear what factors influence it.

The aim of this study is to shed new light on these debates through an examination of legal argumentation in literary fiction. The key research question of this study is thus whether or not such legal argumentation can be considered ideological and therefore whether or not it can be regarded as satisfactory in legal reasoning. Another question is whether such argumentation is beneficial for the judicial decision-making process in which it is used and if so, how should it be properly used in order to strengthen the coherence, comprehensiveness and persuasiveness of judicial decisions.

The study offers some important insights into the relationship between legal argumentation and ideology. Due to practical constraints, this paper cannot provide a comprehensive review of all literature focusing on Žižek's notion of ideology as it is emphasized in Žižek's own texts. It is also beyond the scope of this study to examine the argumentation by literary fiction comparatively in additional countries.

The study arose from my interest in the possibility of cultivation of law (in Nussbaum's sense) through art and particularly literature. Nowadays, cultivation and humanization of law through Law and Literature or Law and Humanities movements is still widely discussed.<sup>8</sup> The main issues addressed in this paper are: a) 'Which art is "good enough" to be a part of legal reasoning?,' b) 'How can literary fiction be used as a legal argument in a proper way?' and c) 'May such argumentation form a part of ideology?'

This paper has been divided into three main parts. The first part begins with definitions of the concepts used in this paper. The second part gives a brief overview of Žižek's notion of ideology and reviews the evidence for the statement of instant presence of ideology in the modern world. It will then go on to the issue of ideology in art as described by Žižek.<sup>9</sup> The second part is focused on the question of which art is good enough to be used as a legal

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<sup>5</sup> Slavoj Žižek, *The sublime object of ideology* (Verso 1989); Alastair Bonnett, 'Art, ideology, and everyday space: subversive tendencies from Dada to postmodernism' (1992) 10 *Environment and Planning D: Society and Space* 69.

<sup>6</sup> Fabio Vighi and Heiko Feldner, 'Ideology critique or discourse analysis? Žižek against Foucault' (2007) 6 *European Journal of Political Theory* 141.

<sup>7</sup> Zygmunt Bauman, *Liquid times: living in an age of uncertainty* (Polity Press 2006).

<sup>8</sup> Martha Nussbaum, 'Cultivating humanity in legal education' (2003) 70 *U. Chi. L. Rev.* 265.

<sup>9</sup> Slavoj Žižek, *Did somebody say totalitarianism?* (Verso Books 2001).

argument. In its first chapter, the emphasis is placed on the characteristics of crime stories. Then it is explained how and why these qualities of crime stories may be used in law. Part three begins by explaining how the argumentation by literary fiction can be used in practice and how it can work as an ideology. Finally I present the findings of the research, focusing on the three key questions that were presented above. The conclusion gives a brief summary and critique of the findings made in this paper.

Sources for this paper were chosen from various fields of legal science, literature and others. Unfortunately, because the combination of detective stories, argumentation by literary fiction and influence of ideology on law in one line of argumentation is quite non-traditional, there are no direct sources which could be used. Because of this, I decided to quote less sources and focus more on the general idea of combination described later in this paper.

## I. DEFINING TERMS

While a variety of definitions of the term ideology have been suggested, this paper will use the definition suggested by Žižek who understands it as

“anything from a contemplative attitude that misrecognizes its dependence on social reality to an action-orientated set of beliefs, from the indispensable medium in which individuals live out their relations to a social structure to false ideas which legitimise a dominant political power.”<sup>10</sup>

This attitude is comprehensively demonstrated in a movie called *The Pervert's Guide to Ideology*, directed by Sophie Fiennes, in which Žižek performs the role of the narrator. In this film, Žižek describes ideology as a kind of container which can involve almost everything. Furthermore, Žižek stresses that

“the paradox (...) is that the stepping out of (what we experience as) ideology is the very form of our enslavement to it.”<sup>11</sup>

Thus, we can conclude that ideology in the most general meaning can be seen as imminent and always present in all parts of our lives. Nevertheless, Žižek argues that

“the concept of ideology must be disengaged from the 'representationalist' problematic: ideology has nothing to do with 'illusion', with a mistaken, distorted representation of its social content.”<sup>12</sup>

Throughout this paper, the term ‘literature’ will not refer to all books and writing (as it is usually understood) but instead to ‘imaginative literature’ which includes only these works with poetic content, writing that possesses a literary quality or distinction of the so-called *belles-lettres*.<sup>13</sup> The term

<sup>10</sup> Slavoj Žižek, ‘The Spectre Of Ideology’ in Slavoj Žižek (ed), *Mapping ideology* (Verso 1994) 3.

<sup>11</sup> *ibid* 5.

<sup>12</sup> *ibid*.

<sup>13</sup> Terry Eagleton, *Criticism And Ideology: A Study In Marxist Literary Theory* (Verso 2006).

“judicial decision” refers to all court decisions which are included in the Czech national database of judicial decisions (ASPI).<sup>14</sup>

Argumentation by literary fiction is used as a synonym to argumentation by belles-lettres or argumentation by literature. All these terms refer to the explicit use of entitling, referencing or quoting of such literary work in legal argumentation. Furthermore, mentioning the name of the author, characters or plot of such literary work is also considered as an argumentation by literary fiction.

In the study, law is understood in a broad sense and we will perceive legal consciousness as a part of law in a broad sense - what is the general perception of society about what the law actually is, regardless of what is regulated by positive law. This clarification is necessary because in the system of continental law the distinction between natural-legal and positive-legal approaches to law is still very important and Law and Literature ideas are better accepted in a common law system. Art can change legal consciousness more easily than influence the content of positive law. Therefore, the influence of art on law is more acceptable in a system where legal consciousness is stressed as a natural part of law. Analogically, depending on this distinction, determination what falls under law and which is no longer part of it, also differs in legal philosophy. A broader interpretation of the concept of law is closer to the philosophy of natural law, which is not limited solely to the state-recognised rules emerging from official procedures.

But even if we disregarded this broader definition of law and insisted on the positive-legal approach, it is necessary to take legal consciousness into account as a basis for decision-making of legislators. If the positive legislation did not reflect the state of legal consciousness in the society and was contrary to it<sup>15</sup>, the effectiveness of law would be compromised from the outset. Compared with the former, the latter does not have a direct impact on law, but only an indirect, mediated impact. This means that we can find a strong argument for the impact of art on law and especially for argumentation by literary fiction in both legal systems as well as in both basic philosophical approaches to law.

When we suppose that the impact of art on law exists and that this impact is possible both in civil law and common law countries,<sup>16</sup> we should then ask if such impact is good for law. After experience of totalitarian regimes, we should be aware of propaganda based on a particular ideology. On the other hand, the social impact of law is seen through the whole of history as extremely useful and it was not necessarily connected with any ideology in the totalitarian sense. So what is the role of ideology in our society and how does it influence art?

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<sup>14</sup> This database is paid and available as a special software by Wolters Kluwer (see <http://www.wolterskluwer.cz/>).

<sup>15</sup> Adam Podgórecki, *Sociologie práva* (Svoboda 1966) 18.

<sup>16</sup> Eleonora Belfiore and Oliver Bennett, *The Social Impact Of The Arts: An Intellectual History* (Palgrave Macmillan 2008).

## II. ŽIŽEK ON CURRENT IDEOLOGIES (IN ART)

Ideology is a controversial topic because any definition of ideology is constantly changing. Žižek claims that:

“The starting point for the critique of ideology has to be full acknowledgement of the fact that it is easily possible to lie in the guise of truth.”<sup>17</sup>

In fact, he explains ideology as a “generative matrix” in a very similar sense as in the movie *The Matrix*.<sup>18</sup> One could argue that our era is obviously post-ideological. Current society is sensitive about any notion of ideology.<sup>19</sup> Especially in Central Europe, the word “*ideology*” still works as a kind of ghost in public debates. It is usually assumed that the ideological era was naturally connected with totalitarian regimes but for Žižek, this assumption is not correct. Ideology is constantly present in our reality.

There is an unambiguous relationship between law, politics and ideology. Commenting on ideology, Žižek argues that

“when some procedure is denounced as “ideological par excellence”, one can be sure that its inversion is no less ideological.”<sup>20</sup>

On the other hand, there are things that we are evaluating as ideological (and what is in fact non-ideological) and we are trying to step out of because of its ideological character. But it is the most probable form of enslavement to ideology.<sup>21</sup> Laws of a democratic state is usually supposed to be non-ideological but how could it be possible when laws of a totalitarian state were and are without any doubt ‘ideological par excellence’? In that case, law of a democratic state have to be an inversion of the previous ones. In conclusion, both original and inversion have to be ideological.

What are the characteristic features of such an ideology? Žižek demonstrates with an example of religion that doctrine, belief and ritual are necessary parts of ideology. Similarly in “secular” cases, ideology consists of a complex wealth of ideas, a material part and a spontaneous part.<sup>22</sup> Conclusively, each “grand narrative” should be seen as a kind of ideology. There are still grand narratives dealing with legal and political systems in society (such as liberalism, capitalism or democracy) as Žižek explains.<sup>23</sup> Each of them has all-demanding features. All possible systems are ideological because even an idea of a (political or legal) system has to be ideological too.

It seems inevitable that any isolation of reality from ideology is impossible. Nevertheless, Žižek states that such a strong notion begins to embrace everything so it cannot be admitted.<sup>24</sup> There are still extra-ideological parts of reality. On the contrary, what seems to be non-ideological is most probably completely ideological. Both extremes of ideological polarity are the same - from an ideological point of view. Current democratic legal systems are no exception.

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<sup>17</sup> Žižek, ‘The Spectre’ (n 10) 6.

<sup>18</sup> *ibid* 2.

<sup>19</sup> *ibid* 3.

<sup>20</sup> *ibid* 3.

<sup>21</sup> *ibid* 5.

<sup>22</sup> *ibid* 7.

<sup>23</sup> *ibid* 7-10.

<sup>24</sup> *ibid* 10.

### III. ART IN LAW AND ITS IDEOLOGY

We must focus first of all on the general relation between law and art. What is the nature of current law and what connects it with art so closely that it justifies their interaction? The answer is imagination. Thanks to its link with culture, imagination is eligible to serve as a tool for grasping and interpreting the law. This ensures that the law does not extend beyond the overall cultural context. Law and art combine values that are the source of every interpretation. Therefore, it is theoretically possible to learn about justice through art.<sup>25</sup>

Use of art in legal argumentation should be understood as ideological. Art is an ideal tool of ideology and ideology is a necessary part of each legal system. Art can support ideological ideas, advertise ideological material apparatus and inspire spontaneous parts of ideology. Art can do the same in legal issues. Moreover, the aforementioned relationship between art and ideology has been common since the very beginning of art and Law and Literature movements provide evidence that there is a similar connection between art and law.

Law, art and ideology function together, but the question is how this connection works. This may be analysed in crime stories. Justice in particular is the core of crime stories; thus we can assume we will find there the source of imagination that can significantly influence the law.

### IV. ART AS IDEOLOGICAL APPEAL

#### 1. Persuasiveness

Let's suppose that legal argumentation should be rational and non-ideological as it is always claimed. On the other hand, it is obvious that it has to be persuasive. The theory of rhetoric states that rhetoricians cannot be too simple and rational in their speeches.<sup>26</sup> They need to find a story hidden behind an individual legal issue.<sup>27</sup> In that case, we should ask which use of art in legal argumentation is as non-ideological as it could be.

Looking for an answer, we need to think about persuasiveness in law first of all in general terms. How does the individual approach the law, how do they explore it and how do they treat it? What abets them to respect and obey the law and, conversely, to disobey it? The answer is always, more or less, connected to legal consciousness. What affects it? Can it be affected even by art? How?

#### 2. Crime story

Naturally, only commonly known information can be commonly comprehensible. The crime story is one of the most popular literary genres so it is an ideal option. Its popularity is caused by, among other things, the

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<sup>25</sup> Martin Škop, *Právo a vášeň: jazyk, příběh, interpretace* (Masarykova univerzita 2011).

<sup>26</sup> Jiří Kraus, *Rétorika v evropské kultuře i ve světě* (2nd edn, Karolinum 2011).

<sup>27</sup> Martin Škop, *...právo, jazyk a příběh* (Auditorium 2013).

viewer's opportunity to live the experience in the detective's or in the victim's own skin. Such a personal experience can work as an effective appeal.

These are the questions that cannot be avoided if we want to think of a crime story as an appeal in law. But even if we come to a positive conclusion that such an influence may occur we must then ask ourselves. If a crime story affects legal consciousness, could it change the law itself? Is there a possibility of a change in positive law based on an impulse arising from art? What kind of art could it be? And can we possibly argue by art in law if there is, indeed, a link between art and legal consciousness?

### 3. Crime story and its characteristics

Thesis that a crime story has the potential to influence the law can be justified by the fact that in the beginning, legal rules are created by a lawyer who has one crucial thing in common with the detective: a way of thinking based on his interest

“in intricate arguments, in dialectical contests, in which the matter to be done now is usually in consideration of less than the method of proving it. The pleasure is yielded by the argument itself and tends to be proportionate to the intricacy of the proof.”<sup>28</sup>

This way of thinking is reflected not only in the wording of the legal rules that are being adopted by lawmakers, but also in the method of how other lawyers interpret such norms. It is thus reasonable to assume that if there is a work of art expressing values of law and speaking to lawyers in a language natural to them, it can therefore be the impetus to change the law. So how do crime stories differ from other art forms and should they have greater effect on law?

When we want to determine the essence of a crime story, the shortest way leads us to the etymological origin of the English verb 'to detect' (to discover, uncover, or unveil) which has its origins in the Latin 'detegere' which holds the same meaning. The process of unveiling the main mystery is therefore precisely the core that makes a crime story a thriller. Such uncovering includes seven steps already defined by an author well-known to lawyers, Roman rhetorician, Marcus Fabius Quintilianus. In accordance with his theory both the detective and the reader must solve *quis* (who), *quid* (what), *ubi* (where), *quibus auxiliis* (with whose help), *cur* (why), *quomodo* (how) and *quando* (when). The author of the detective story must build the structure of his work depending on these seven steps. The process is called a gnoseological narrative organization and also includes two specific procedures: time inversions and personal views (visions). The idea again reflects the concept of understanding usually applied by law. Even in this case one must contemplate the interpreter himself because the credibility of his statements is always relative and no information mediated by a man can be taken as an entirely objective fact.<sup>29</sup>

An important psychological moment, on which the reader (and similarly the addressee of legal rules) bases his attitude towards the subsequent solution offered by a detective, is when he makes an acquaintance with the detective and the murderer. In a traditional crime story the detective

<sup>28</sup> R. Austin Freeman, 'The Art of the Detective Story' in Howard Haycraft (ed), *The Art of the Mystery Story: a collection of critical essays* (Biblo and Tannen 1946).

<sup>29</sup> Tzvetan Todorov, *Poetika prózy* (Triáda 2000) 104.

is introduced to the reader first and at the very end the murderer. The detective typically represents the element of Good, while the murderer represents Evil. Thus the reader identifies themselves with the detective from the outset; supporting the Good and forms values in accordance with how the author presents them.<sup>30</sup>

If we return to literary theory, a crime story is composed of four elements. These are

“(1) statement of the problem; (2) production of data for its solution ("clues"); (3) the discovery, i.e., completion of the inquiry by the investigator and declaration by them of the solution; (4) proof of the solution by an exposure of the evidence.”<sup>31</sup>

The author is an interpreter of the story, because through the wording and storytelling structure he chooses, he presents his own version of the story to the reader. At the same time he creates an impression that the reader is the one revealing the truth. Both of these ways of identification with the final solution are necessary for the reader, since he needs not only the feeling of external discovery of the truth but also inner recognition of this truth. By analogy this combination can be compared to the process of enculturation, which includes both the process of exteriorisation and interiorisation of values of the culture.<sup>32</sup> This analogy is fitting for our purposes, especially because the law is part of the culture and thus when an individual adapts to the culture through enculturation, she accepts the law as an integral part of it.

Now we have defined a detective novel as a literary structure *sui generis*. At the beginning there is a mystery that must be resolved in its conclusion. This is the main objective of the author and the purpose of existence of the whole genre. Regardless of the type of detective story we consider, it may influence the notion of justice in society because it is built on distinguishing between Good and Evil. It is consequently connected with ethics and morality. One of the theories of the genesis of a detective genre is even based on the response of society to the new concept of crime, law and justice. Although law is a system different from ethics and morality, it does have common values. One other thing detective stories and law have in common is the specific form of narration.

This is what makes detective stories an ideal subject for research of critical theory. Among its scholars interested in detective stories, such as Roland Barthes.<sup>33</sup> Individual discussions about the reason for the popularity of the detective genre, gender aspects or influences caused by regional culture cannot change the fact that detective stories are in general one of the most popular, have one of the largest audiences and thus probably one of the biggest influences. Let us, therefore, ask how this influences work and how it could be used.

## V. IS ART CAPABLE OF CHANGING REALITY?

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<sup>30</sup> Pavel Grym, *Sherlock Holmes a ti druzi: čtení o detektivech a detektivkách* (Vyšehrad 1988) 282.

<sup>31</sup> Freeman (n 28).

<sup>32</sup> Miloš Večeřa and Martina Urbanová, *Sociologie práva* (Aleš Čeněk 2011).

<sup>33</sup> Roland Barthes, 'An introduction to the structural analysis of narrative' (1975) *New Literary History* 237.



Art affects society, entertains and educates it. Art is a language in its own way, a kind of communication. It therefore creates a socio-cultural system while being part of it. Art affects the emotions of the audience, offering the possibility of catharsis as described by Aristotle.<sup>34</sup> Some movements - such as realism and naturalism - even deliberately aimed at highlighting some of the problems in society. Postmodern art is based on the desire to shock and cause intense emotional responses as well. Hence we can deduce that art is often intended to influence society.

A piece of art serves as a mirror of reality so well that it includes even details usually neglected or unnoticed through regular viewing. The author of such art presents his subjective view of the problem, which is residing in his work, but also conveys certain objective information. Subjective and objective parts of the artwork can usually be distinguished from each other (at least approximately). The audience can create its own opinion on the issue. The author of the artwork is a narrator who presents his values and it is only up to the audience to decide whether they align with these values or not.

Art is also a part of contemporary discourse and as such it affects our postmodern world, which again gives rise solely to such art that fits into the discourse. But this art does not have implications only in the field of itself but in other parts of the said discourse and, therefore, in law as well. Thus if an artist creates a work of art that describes a problem concerning law it may affect the law in several ways. It may affect the legal consciousness of individuals who will then behave in accordance with the message contained within the said artwork. This approach may not always be based on consent with the message, but on the contrary or refusal. Rejection of a particular procedure may be the most significant response to the impact of art. This manner is therefore the most likely to occur and also the most realistic. It is the first stage of the possible influence of art on law, while the influence often ends at this first stage without expanding further. However, there is a possibility of expansion to the second stage – where this may be an influence on wider public opinion. This implication is not possible without the first stage, the difference being that the former takes into account the behaviour of large groups of people forming public opinion. Public opinion may as a whole have greater impact on law, since social acceptance is crucial if a rule is to become a binding rule of conduct.

At this point we can accept the thesis that art might change the law if we think of "law" in its broader meaning. Given that most of society embraces a rule based on the artwork, this acceptance leads to an interpretative rule at the least, according to which currently existing norms are interpreted. On the other hand, if we take the law in the strict meaning of the word we cannot yet talk about changes based on art. The wording of legal norms is not changed by a mere shift in public opinion. Such change requires the third level of influence of art on law, the impact on the legislator himself. This effect may be based on the transformation of the legal consciousness of an individual, e.g. when a member of parliament reads a novel about a miscarriage of justice and decides to initiate abolition of the death penalty. However, it is more likely that transitions of public opinion will be reflected in the will of

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<sup>34</sup>Aristotelés, *Poetika* (Orbis 1962).

lawmaker, because the problem brought to light by the artwork will be considered in society a serious problem that must be addressed by law.

If the legal framework established due to such an impulse was actually addressed in the legislative process, it is conceivable that the artwork in question could be used as part of the argumentation, speaking in favour of adoption of such legislation. In this case there would be no doubt that a change in law was indeed reached. Not to remain in a purely hypothetical sphere, it should be noted that for example The Legislative Theatre of Augusto Boal was created for the purpose of initiating change in society through art and was successful.<sup>35</sup> However, it is a theatre created exclusively for the purpose of amending the law, so it is not a pure example of the influence of art on law. But even these examples can be found - in Uncle Tom's Cabin, for instance. The question is whether the ability to change reality belongs to all pieces of art, or if each artwork must meet certain conditions in order to make such an influence possible.

## VI. IS A CRIME STORY CAPABLE OF CHANGING THE LAW?

The answer to the question raised is „yes“, in cases where there is a sufficiently strong relation between the artwork and reality. The relation may lie in the author's mastery in addressing a real problem, which should be regulated by law, using a fictional story. The problem does not even have to be set in a contemporary real world. It may be a historical story or a science-fiction novel, but the message of the work must be related to the location and the time where it should be reflected by law. The writing has to contain an idea applicable both as an inspiration for a legal norm and as an argument for its adoption. Otherwise, referring to the impact of art on law would be meaningless.

But let us get back to the manner in which we understand a detective story. As I mentioned previously, it is a genre bound by many rules. However, it can be seen in a much broader meaning. That is interesting for our purpose, but misleading at the same time. If we thought of a detective story in a broader sense, its influence on law would not differ from the influence of other pieces of art. There would be no reason for that, since the detective story itself would not significantly differ from others.

This would not mean that it is impossible for *Hamlet* to influence the legislation applicable today. It might be the simple strength and eloquence of Hamlet's values affecting the law. In general, every artwork has the potential to influence law, assuming it carries a piece of inspiration. Nonetheless, nothing can reinforce the strength of values in terms of means of communicating the message.

## VII. ARGUMENTATION BY LITERATURE

The area where art influences law most is in legal awareness. This includes knowledge of the objective law, as well as the attitude towards law

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<sup>35</sup> Augusto Boal, *Theater of the Oppressed* (Pluto Press 2000).

including the values.<sup>36</sup> But where else to find values in a postmodern world other than in art? The Postmodern world gave up on scientifically rational and hence impersonal truths. It is searching for a single truth, which contains multiple individual truths and justices to cover the diversity of the society after postmodern changes.

The law in a postmodern state contains in its core an ethical dimension, but it cannot draw this from itself. A postmodern state cannot prioritize one value over another and justify this action through its own system of values.<sup>37</sup> The state has to seek compromise between multiple different truths leading to the most just solution. The basis for this compromise must be individual truths related to the problem. The source of these truths may be art. For this source to be acceptable as a part of the only truth and justice that the postmodern law seeks, it needs to meet certain requirements.

The author's authority is in contradiction to the classic postmodern doctrine about the death of an author,<sup>38</sup> but in this case we will have to moderate the approach to postmodern theory, similarly to the case of the legislator. The authority of the author of the artwork used in legal argumentation determines the value of the piece in the same way as in the case of the legislator. It is caused by the fact that a large part of society is not and cannot be familiar with these artworks. As the amount of existing works of art is immense, it is impossible for everyone to know everything. From this amount of works there are some pieces that excel – artistic mastery of their authors being so highly regarded that knowledge of these works is a part of general cultural knowledge. It is hard to determine what the subject matter of this generally assumed knowledge is. Although there are authors, who are so important that there are no doubts about their place in the general cultural knowledge. These authors are for example Sophocles, Shakespeare, Dostojevski, Kafka or Beckett.<sup>39</sup>

The author's authority however has yet another dimension. In the postmodern world controlled by the media and almost fully globalized when it comes to information,<sup>40</sup> the personality and self-presentation of the author plays its role in the artwork's evaluation. In the eyes of the public, the author's persona becomes an integral part of their authority. When it comes to authors from the past, this dimension disappears, because it is questionable, fully unrecognizable or at least not generally known.

As for a contemporary author the situation changes entirely. Their artwork is being perceived in the context of their professional and personal life, their artistic or non-artistic opinions. It raises the question of whether the artwork of such an author has any persuasiveness at all when it comes to the values it communicates. The second condition, the artistic value of the artwork, is closely related to the first one and has to be accomplished cumulatively. Only after meeting the first condition we could get to an assessment of the author's works. Each artwork must then be assessed according to its general content, familiarity and its widely regarded artistic

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<sup>36</sup>Roger Cotterell, *The Sociology of Law* (Butterworth 1984).

<sup>37</sup>Martin Škop, *Právo v postmoderní situaci* (Masarykova univerzita 2008).

<sup>38</sup>Roland Barthes, *Image-music-text* (Macmillan 1978).

<sup>39</sup>Wigmore (n 1).

<sup>40</sup>Škop, *Právo* (n 37).

quality. Only while insisting on meeting all aforementioned conditions, there is a higher probability of avoiding a situation where we take into consideration an artwork that has a questionable artistic quality. The third condition is then the content of the value of the work that has met the first two conditions. Only work that tackles core questions of values that are at the same time inevitably connected to law but irresolvable by law, could directly influence a society's legal awareness.

### VIII. HAMLET?

The question is if Hamlet can be understood by law as a Scandinavian crime fiction. We know that this play can influence law. It meets all the conditions mentioned previously. At the same time, it can be described as a crime fiction since it has all the necessary characteristics of that genre. And it takes place in the North of Europe, so technically we really can refer to it as 'Scandinavian crime fiction.'

On the other hand, for the purposes of legal argumentation and especially for the purposes of argumentation in court decision labels are very important. Unfortunately, crime fiction has a label of low culture, so its real content and values are generally seen as less important. We therefore have to be very careful with labelling art in legal argumentation. If we were to label a piece of art inappropriately (for legal purposes) we could lose an opportunity to convince our audience of its ideas. And there are a great deal of them in Hamlet.

Žižek himself talks about Hamlet as one of versions of the legend of, Oedipus, one of the Freudian myths. He explains that the usual reading of this story is a narrative of an obsession and incest. Nevertheless, Žižek claims that the myth of Hamlet is older than that of Oedipus because it is a universal myth which can be found in every culture.<sup>41</sup> The possibility of a mythical structure in modernity seems to be suspicious but he explains that postmodernism inverts modernism and this one returns to great mythical themes. The only difference is that postmodern myths are treated like common fragments of every-day life.<sup>42</sup> They are created by archetypal postmodern procedures when rewritten by filling in gaps.<sup>43</sup>

The most striking result to emerge from the aforementioned information is that Hamlet can be described as Scandinavian crime fiction, i.e. it can be evaluated as a piece of low culture and also as a part of popular culture. And in contrast, it is usually seen as a perfect example of high culture because it was written by William Shakespeare and it is a classic masterpiece of the Elizabethan era. But there is also the third option: the third dimension of understanding Hamlet is Žižek's point of view. This attitude is different from both the first (popular culture view) approach and also the second. It highlights different layers of Hamlet's story than the previous two. It stresses psychoanalytical level of this myth.

Overall, these results indicate that there are always several "labels", various interpretations of a particular piece of art. All of them can influence

<sup>41</sup> Žižek, *Did somebody say* (n 9) 26.

<sup>42</sup> *ibid* 29.

<sup>43</sup> *ibid* 30.

law and it is difficult to say if this influence is stronger in popular culture or in high culture. It is important to remember that only few people know the actual stories of high art pieces and only a few of them have ever thought of various interpretations of this particular piece of art. In the case of popular culture stories there is usually only one reasonable interpretation and the story is quite simple and often commonly known.

These results suggest that both popular culture stories and high culture can be used for the purposes of legal argumentation. Only a form of this use should be different in order to be persuasive. As for high art, you can merely use a “label” as “Hamlet” to depict a situation (partly) similar to the history of the prince of Denmark or you can use some famous quote suitable for your case. In this case you use this rhetoric ornament to prove your professional efficacy and to support your argumentation by mastery of some well-known author. This way of using literature in legal argumentation is used most often. It is also the most ideological one since the whole idea of differentiation of “proper” high art which can be used in “good” legal argumentation is based on ideology in art. This differentiation is so confusing and unclear that a postmodern state cannot manage it. However, it does it when its judges present in their decisions only this way of using literary fiction.

One can also work with an alternative interpretation of some literary masterpiece but then you have to explicitly explain it in your argumentation because you cannot pretend that your audience have the same knowledge as you. This kind of application of art in legal argumentation seems to be most appropriate in the sense of Law and Literature theory because it is based on ideas of the Law and Literature movements asking for a multidisciplinary and critical approach to law. Only this way of using literature enables both lawyers and their audience to be critical of society, the facts of the case and of law. This way of quoting literature cannot be ideological because it presents only a critical prospective, one option of understanding, an individual approach introduced by an author. It cannot serve the ideology because it cannot meet its requirements.

As for popular culture, it is easier to simply use “labels” (like “pop-culture” or “detective fiction”) because usually there is nothing deeper than this label to it. And of course, the most famous pieces of popular culture are so widely known that they do not need any further explanation. Unfortunately, they usually do not contain any critical point of view so they cannot be used in the same way as high art masterpieces. But you can use them as a metaphor in a literary sense, as an example of a certain situation in society etc. The biggest advantage of this use of literature in the legal argumentation is that it can work as a mirror of a previous influence of literary fiction on law in general. Popular culture is usually quite new and commonly known so it can easily change law in all possible ways. It can work as an appeal. When you use it in your argumentation you will use a possible reason for a real change of law or at least a good metaphor for it. This is an entirely different way of using literary fiction in legal argumentation. It is based more on legal sociology than on the Law and Literature movements. And of course, it can be ideological - through law and literature – because there is often an ideological background to each influence of art on law.

## CONCLUSIONS

A strong relationship between law and literature has been reported in literature many times. Despite it, very little was found in literature on the question of using literary fiction in legal argumentation. This study set out with the aim of assessing the importance of this way of argumentation as a necessary social appeal through law.

The first question in this study sought to determine whether or not such legal argumentation can be considered ideological, therefore whether or not it can be regarded as satisfactory in legal reasoning. The answer is that it can be and that it usually is. But it does not mean that it cannot be regarded as satisfactory. It is ideological as well as all other ways of argumentation based on values. It is natural and inevitable.

Another question is whether such argumentation is beneficial for legal decisions in which it is used and if so, how should it be used properly in order to strengthen coherence, comprehensiveness and persuasiveness of such decisions. The answer is that it could be beneficial when an author of such argumentation is aware of its aim. When he wants to use a rhetorical figure, one should use a “label” of some masterpiece of high art. When he wants to prove his critical ability and provide an alternative approach he should also use high art but with a detailed explanation. And finally when one wants to point out the state of legal awareness one should use such a piece of art which really influenced it, usually a piece of popular culture.

An initial objective of the project was to identify if Shakespeare's play Hamlet can be seen as a Scandinavian crime fiction (for legal purposes). The results of this study show that it depends on the purpose of such use but in some circumstances Hamlet could be treated as one of such popular Scandinavian crime fictions.

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